

DATE: October 1, 1985

TO: Jack Sturak, Assistant City Treasurer

FROM: City Attorney

SUBJECT: Transient Occupancy Taxes; Delinquency

Assessment of

By memorandum dated July 18, 1985, you requested the advice of this office concerning an appeal from a Transient Occupancy Tax (TOT) determination concerning Mr. and Mrs. Zounes. The Zounes own three separate apartment buildings in the City of San Diego, separate units of which are rented out to transients for 30 days or less. The Zounes challenge the applicability of the transient occupancy tax to their rentals on two basis. The first is that they were not operating a "Hotel"; the second is that they had no notice of the applicability of the provisions of San Diego Municipal Code Chapter III, Article 5.

It was established that the Zounes were aware of TOT requirements in Chula Vista and National City where they own

similar apartment units. It is not apparent whether they claim ignorance of the San Diego TOT requirements or merely whether they claim they were not provided notice of such. It was also established that the Zounes advertised in newspaper classified sections under "Hotels - Motels" and held out their rental units at a weekly rate of \$100.

Your memorandum asks: (1) whether the operator must be first notified by the City of the TOT before being held accountable for the tax; (2) whether the City's definition of "hotel" contained in San Diego Municipal Code section 35.0102(b) is overbroad; (3) what the term "held out as such to the public" under San Diego Municipal Code section 35.0102(b) means in the context of this appeal; and (4) is the penalty under section 35.0105 uncollectible against an operator until he is made aware of such provisions.

Your questions may be summarily answered as follows: The operator need not have actual knowledge of the TOT or its provisions before his liability for collection and remission of taxes and penalties accrues so long as the ordinance is enacted pursuant to charter or constitutional authority. Due process is observed so long as there is a nexus between the subject matter of the tax and a valid governmental objective. Under the TOT,

the definition of "hotel" can include a transient apartment facility, since the term "transient" refers to a tenancy of "less than one month", thus including all structures used for such short term, or transient, occupancy. In this context, the question of whether transient lodgings are held out to the public as such contemplates a factual determination which, under the facts outlined in your memorandum, appear to be satisfied insofar as the Zounes advertise in public newspapers under the heading of "hotels-motels".

Our reasoning proceeds on the basis that the issue of actual knowledge of the tax laws is not of serious legal consequence, any more than ignorance of the law is generally considered a defense to a failure to conform to statutory requirements. From a due process viewpoint, it is sufficient that taxes be imposed under the authority of a charter, statute or the state constitution. See generally, *L.A. Brewing Co. v. Los Angeles*, 8 Cal.App.2d 379 (1935); 13 Cal.Jur. 3d, Constitutional Law, Sec. 170. The power of a charter city to raise revenue is a constitutional right conferred by California Constitution Article XI, section 5. The Transient Occupancy Tax (TOT) is imposed by the City of San Diego as a revenue measure under the authority of the City Charter, and is thus subject only to those restrictions and limitations appearing in the charter itself or the state

constitution. See *Atlas Hotels Inc., v. Acker*, 230 Cal.App.2d 658, 664 (1964). See also, *Ainsworth v. Bryant*, 34 Cal.2d 465 (1949). The essential purpose of this revenue measure is to promote the City of San Diego for tourism, conventions and related activity using a source of funds which is generally not subject to other taxation in the City. This objective fulfills a legitimate governmental interest, *Atlas Hotels, Inc., supra*, thereby meeting constitutional due process considerations. See, *Union Oil Co v. State Board of Equalization*, 60 Cal.2d 441, 457 (1963); *Montgomery Ward & Co. v. State Board of Equalization*, 272 Cal.App.2d 728, 741 (1969); *Los Angeles v. Moore Business Forms, Inc.*, 247 Cal.App.2d 353, 360-61 (1966).

Although the taxes are imposed on the transient rather than the operator by San Diego Municipal Code section 35.0103, the operator is under a clear legal duty to collect this tax and remit it to the City Treasurer by section 35.0105.

Notwithstanding, the Zounes' attorney asserted in a letter he filed with the appeal that a strict interpretation of tax laws is

required before the Zounes can be liable for a tax that is imposed on a third party. Citing the case of *Knudsen Dairy Products Co. v. State Bd. of Equalization*, 12 Cal.App.3d 47 (1970), hearing denied December 17, 1970, he argued that due

process and a strict interpretation would favor the Zounes' contention that they are merely apartment renters, rather than holding themselves out as operating a hotel, motel or inn. The Knudsen Dairy case he cited, however, allowed a tax liability to be imposed against a third party successor in interest when the law could construe a duty to collect or remit a particular tax by such a third party. Thus, since San Diego Municipal Code section 35.0105 clearly requires the operator of a "hotel" to collect the tax from the "transient", the law cited by the Zounes' attorney supports the City's position, rather than the contrary position.

Under San Diego Municipal Code section 35.0102, a "hotel" is "any structure" designed for occupancy by transients, and "transients" are therein defined as persons "entitled to occupancy by reason of concession, permit, right of access, license or other agreement for a period of less than one month." (Emphasis added). This office has previously opined that the term "hotel" broadly includes any type of structure where a transient may enjoy tenancy privileges. This has been held to include short-term occupancy of time-share condominium units, although certain other factors could make such infeasible. See Memorandum of Law dated April 8, 1981, copy attached. It has also been the opinion of this office that a private club which rents out rooms only to members is subject to the TOT. See

Memorandum of Law dated March 30, 1971, similarly attached. By obvious analogy, although "hotel" normally refers to a certain type of structure, it does, under these definitions and interpretations, include apartment units used for short-term occupancy. Further, Revenue and Taxation Code section 7280 allows a City to impose the TOT tax on any "hotel, inn, tourist home or house, motel or other lodging unless such occupancy is for any period of more than 30 days." Although the City of San Diego TOT Tax is based on City Charter rather than Revenue and Taxations Code section 7280 or its predecessor, (See Atlas Hotels, *supra* at 665), it follows that, statutorily, any tenancy for 30 days or less can be validly subject to the TOT tax.

This disposes of the Zounes' argument that they are not operating a "hotel, motel or inn", and thus are not operating a structure to which the occupancy tax applies. Further, since they advertise their rental apartments under a "hotel-motel" index in newspaper classifieds, they do, in fact, hold themselves out as operating transient facilities rather than apartments.

As to the penalty for not collecting the TOT tax, San Diego Municipal Code section 35.0109 allows the hotel operator to contest any tax determination, but does not prescribe a standard

for relief. The burden of proof appears to rest with the taxpayer once the Treasurer has established that a tax is due. It is suggested that Revenue and Taxation Code section 6592, which establishes a penalty relief procedure for state sales and use taxes, may be appropriate to use as a standard in this case, or similar cases. To the extent that sales taxes due from a buyer are collected by the seller, the situation is then analogous to the TOT where the tax is collected by the operator from the transient. Under section 6592, relief from a penalty for a failure to collect or make a timely return of sales taxes is permitted only when due to reasonable causes and circumstances beyond the remitter's control which occurred notwithstanding the exercise of ordinary care and in the absence of willful neglect.

As noted earlier, the Zounes do have general knowledge of TOT taxes in other jurisdictions and no showing was made that they exercised any degree of care in ascertaining whether a TOT tax was not due in San Diego. Since they are involved in the general business sense of advertising and renting out transient apartment units, it is reasonable to place upon them the burden of establishing a basis for relief from what is now regarded as a common type of locally imposed revenue tax applicable to a particular business.

Implicit in your memorandum is yet the question of whether

some procedure for actually providing notice to other persons who are subject to the TOT tax should be considered. Obviously, any procedure which assists in revenue collection is desirable. As noted herein, the existing legislation under Chapter III, Article 5 of the San Diego Municipal Code is legally sufficient to permit collection of TOT taxes and imposition of penalties. It is broad enough to include all types of structures or lodgings for transient occupancy purposes. Improvements can always be made to any legislation or the procedures thereunder. If it is desired to pursue this issue further separately from this appeal, please contact the undersigned.

JOHN W. WITT, City Attorney

By

Rudolf Hradecky

Deputy City Attorney

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Attachments

ML-85-61